



Issue Date: 30 January 2008

CASE NO. 2008-TLC-00012

In the Matter of:

CREEKSIDE MUSHROOM LTD.,
Employer

DECISION AND ORDER DISMISSING UNTIMELY APPEAL

This matter arises on appeal by Creekside Mushroom Ltd. (“Creekside” or “Employer”) from the denial of an application for temporary foreign alien labor certification under the H-2A program, which provides for the admission of temporary foreign agricultural workers. Under the INA, 8 U.S.C. § 1101 et seq., as amended by RCA, P.L. 99-603, the Attorney General has the authority to oversee the admission of temporary foreign agricultural workers.¹ For the Attorney General to approve a petition for the admission of aliens under the H-2A program, an employer must first file an application for labor certification with the Secretary of Labor. See 8 U.S.C. § 1188 (1986). The Secretary, in turn, may not grant the certification unless she determines that:

- (A) there are not sufficient [U.S.] workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Id. § 1188(a)(1). See generally, 20 C.F.R. Part 655 (52 Fed. Reg. 20496 (1987)).

Creekside appeals the Certifying Officer’s (“CO”) decision of October 23, 2007 denying certification of the employer’s application for temporary agricultural labor certification for 50 workers in the occupation as Harvest Worker; Vegetables. AF, 7.² In her decision, the CO “determined that the growing of mushrooms is neither temporary nor seasonal in nature. Rather, the employer’s business operations involve planting and harvesting mushrooms grown on a daily, and year-round basis.” Id.

¹ Primary responsibility under the INA now rests with the Secretary of Homeland Security and the United States Citizenship and Immigration Services (“CIS”), rather than the Attorney General.

² AF references are to the Administrative File that has been previously submitted to this court by the Certifying Officer in this case.

Creekside's appeal was received at the Office of Administrative Law Judges on January 18, 2008. Employer's appeal was dated January 17, 2008. AF 1-5.

The Certifying Officer files a motion to dismiss arguing that the appeal is untimely as it was filed 86 days after the date of the Certifying Officer's October 23, 2007 decision denying certification and under 20 CFR § 655.104(c) an appeal must be filed within seven days of notice of the denial.

20 CFR § 655.104(c)(3) provides that in order to obtain a review or hearing on a nonacceptance or an H-2A application, the employer, within seven calendar days of the date of notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of the Department of Labor.

The certifying officer's October 23, 2007 decision denying certification included a Notice of Appeal Rights which stated:

Under the regulations at 20 CFR 655.104(c), you may request an expedited administrative review or a de novo hearing on the denial by a Department of Labor (DOL) Administrative Law Judge. To obtain such a review or de novo hearing, you must, within seven (7) calendar days of the date of this notice, file by facsimile (fax), telegram or other means normally assuring next day delivery, a request to the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street NW, Suite 400, Washington, D.C. 20001-8002, with a copy to this office. A.F. 8.

Employer's failure to file a timely appeal in accord with 20 C.F.R. § 655.104(c)(3) requires dismissal of the appeal. See Mike Langley Farms, Inc., 1999-TAE-001 (ALJ Nov. 13, 1998); Commercial Landscaping Service, 95-INA-00455, 1997 WL 780336 (BALCA Dec. 11, 1997); Piscataway Auto Body, Inc., 2002-INA-00098, 2003 WL 22358846 (BALCA Sept. 29, 2003); Better Food, 2004-INA-14, 2004-INA-15, 2004-INA-16, 2004-INA-17, 2004 WL 3111057 (BALCA Dec. 16, 2004); Frank's Foreign Car Service, 2005-INA-00045, 2006 WL 4579810 (BALCA March 9, 2006); Rasberry Moon, Inc., T/A Moonstruck Restaurant, 2007-INA-00016, 2007 WL 1798691 (BALCA June 12, 2007); Global Horizons, Inc. et al., Case No. 2006-TLC-00013 (OALJ Nov. 30, 2006).

ORDER

Accordingly, Creekside Mushroom Ltd's appeal of the Certifying Officer's decision of October 23, 2007 denying certification of the application for temporary agricultural labor certification is dismissed.

A
THOMAS J. BURKE
Administrative Law Judge